The Status of Pregnant Women and Fetuses in US Criminal Law

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In 2001 the US Supreme Court ruled for the first time in a case directly related to the criminal prosecution of pregnant women for alleged fetal harm. In Ferguson v City of Charleston the Supreme Court considered whether women retain constitutional rights in pregnancy, specifically, the Fourth Amendment right to be free from unreasonable or warrantless searches. The court concluded that drug testing of pregnant women for the purpose of criminal investigation may not be conducted without a warrant or explicit consent, even when justified by the benign purposes of protecting fetuses and promoting drug treatment. This case addressed only the issue of evidence collection for criminal prosecution of pregnant women, not the more general question of whether prosecutions are permissible.

Legal activity on this broader question has occurred at the state level for more than 2 decades. To date, no state legislature has adopted a law that creates unique criminal prohibitions against protecting fetuses and promoting drug treatment. This explicit consent, even when justified by the benign purposes of protecting fetuses and promoting drug treatment. This

In order to clarify the status of pregnant women and fetuses in US criminal law, we examined written legal opinions in cases in which women were criminally prosecuted based on claims that their action or inaction risked fetal harm. We located cases by searching LexisNexis and Westlaw using the following terms: pregnant, pregnancy, drug(s), illegal drug(s), cocaine, heroin, alcohol, (meth)amphetamine, addiction, unborn child, prenatal, drug delivery, child, child abuse, fetus, fetal, homicide, feticide, maternal, perinatal, and neonatal. We searched only for published State Appellate or State Supreme Court opinions, as these cases set legal precedent. We also consulted with agencies and attorneys called upon to represent women when they are prosecuted. We found 22 opinions in 16 states, and 1 opinion in the military court system.

Women were generally charged with 1 of 3 types of crimes: child endangerment/abuse;7-21 illegal drug delivery to a minor;22-25 or fetal murder/manslaughter.26-28 In all abuse cases, prosecutors equated a viable fetus with a child and argued that pregnant women’s drug use or addiction constituted child abuse. In all drug delivery cases, women were accused of trafficking drugs to the fetus through the umbilical cord. Some prosecutors, conceding that fetuses are not legal persons, argued that the drug “delivery” occurred in the moments after the infant was born, but before the umbilical cord was clamped and cut.22,23,25 In all murder and attempted murder cases, prosecutors again equated the viable fetus with a child and argued that existing murder laws applied to women’s actions.

When questions arise about the meaning or application of a criminal law, the court’s first function is to determine and enforce the legislature’s intent. In all of the cases we examined, with the exception of those in South Carolina, courts declined to expand existing state laws to punish pregnant women based on claims of fetal rights, finding no evidence that legislatures intended existing laws to be used this way. Judges determined that the plain meaning of words like “child” does not include fetuses, that the terms “parent” or “guardian” do not include pregnant women in relation to the fetus, and that the word “delivery” does not include drug transmission through umbilical circulation.23,24,28 Courts pointed out that when legislatures intend to discuss a fetus, they use the word “fetus.”7,8,12-19,20,24,28 Some courts also held that judicially rewriting existing laws to make them suddenly applicable to pregnant drug-using women would violate constitutional due process principles of fair warning and notice.7,11-13,15,19,24,28 Several courts noted that such a revision to the law would make them unconstitutionally vague, permitting prosecution for a limitless number of situations, from smoking cigarettes to giving birth at advanced maternal age, to employment at a potentially hazardous job.7,11,15,28 Many courts also recognized that such expansion of the law could unwittingly encourage women to have abortions or to avoid seeking prenatal or addiction care.8,9,12,13,25,28 Only South Carolina’s high court has come to a different conclusion, interpreting the word “child,” in its criminal child endangerment statute, to include viable fetuses.28 By doing so, the court made its child endangerment statute applicable to pregnant women whose actions risk harm to a viable fetus, and created precedent for applying other South Carolina criminal laws to pregnant women as well.27

Even in South Carolina, where using drugs or being addicted to drugs during pregnancy has effectively been criminalized, pregnant women retain their Fourth Amendment freedom from unreasonable and warrantless searches. In Ferguson v City of Charleston the Supreme Court held that “performance of a diagnostic test [urine drug screen] to obtain evidence of a patient’s criminal conduct for law enforcement purposes is an [unconstitutional] unreasonable search.
if the patient has not consented to the procedure.31 This case challenged a policy that began in 1989 at Medical University of South Carolina. This institution, in collaboration with local police and prosecutors, initiated a policy of conducting urine drug screens on selected pregnant women, without their consent, to look for evidence of cocaine use. Women testing positive were reported to police, and health care providers coordinated their in-hospital arrests on charges of child abuse or drug delivery. Thirty women were arrested. In 1993, 10 women challenged the policy on several constitutional and statutory grounds. Ultimately the Supreme Court addressed only the “search and seizure” claim, concluding that the hospital policy of collecting evidence did violate the women’s constitutional rights. The court then set an extremely high standard for consent: “when [state hospital employees] undertake to obtain evidence [of criminal conduct] from their patients for the specific purpose of incriminating those patients, they have a special obligation to make sure that the patients are fully informed about their constitutional rights.”1 Hospitals and physicians who do not follow this obligation may face civil liability, as the Fourth Circuit Court indicated when it allowed 8 of these plaintiffs to proceed with monetary damages claims against the hospital and individual staff members.10

Thus, in all states but South Carolina, using drugs during pregnancy is not a crime. Even in South Carolina physicians may not subject a woman to nonconsensual drug testing for the purpose of such criminal prosecution, as the Supreme Court determined. Although the state of the law has been made very clear by the courts, some potentially confusing issues remain.

1. Some bioethical models assert that physicians have moral obligations to fetal “patients,” separate from obligations to pregnant women.32 These models may imply that fetuses have a right to medical attention independent of pregnant women’s consent. However, even when moral obligations exist, they do not equal legal obligations.32 In the Angela Carder case the court provided clear standards regarding forced medical interventions on behalf of a viable fetus. In this case a cesarean delivery was performed on a critically ill woman at 25 weeks’ gestation, over her own objections and those of her family and attending physicians. Both Ms Carder and the neonate died shortly afterward. The appellate court in this case ruled that the hospital was wrong to perform the surgery and that women do not lose their rights to bodily integrity and informed consent upon becoming pregnant. The court further concluded that neither fetal rights nor state interests on behalf of the fetus supersede women’s rights as ultimate medical decision maker.33,34 Two subsequent appellate courts have ruled similarly.35,36

2. Numerous civil laws appear to create fetal rights separate from pregnant women’s. The recent federal action to expand the States Child Health Insurance Program to include fetuses is an example. This action does not change the legal status of the fetus, although it may give the erroneous impression of doing so.37 Feticide statutes and civil wrongful death statutes that permit punishment of third parties who attack pregnant women are further examples.38,39 These laws, however, hold only third parties accountable for causing pregnancy loss. Courts have declined to extend these laws to pregnant women, recognizing that pregnant women’s actions with respect to their own bodies raise different legal and policy issues.40

Civil commitment laws and civil child welfare laws addressing the subject of drug use during pregnancy may intensify confusion regarding physicians’ legal obligations. Three states allow civil commitment or detention of pregnant women using drugs, although they do not necessarily mandate reporting.41,42 Other states address pregnant women’s drug use through civil child abuse laws.43 These laws vary considerably: In some states drug use during pregnancy triggers an evaluation of parenting ability; in others it is a basis for presuming neglect. None of these laws mandates universal drug screening. Clinicians need to be aware of their own state’s mandates but should also realize that these laws are intended to protect children, not to punish parents or to establish fetal rights.

3. Health care personnel may hear contradictory information about the effects of prenatal drug exposure or appropriate responses to addiction. Some early media reports depicting significant neonatal effects of cocaine are now understood to have been exaggerated.44 Recent child development research has not found the effects of prenatal cocaine exposure that earlier uncontrolled studies reported.45 Poverty and its concomitants—poor nutrition and inadequate health care—are now known to overshadow many of the effects popularly attributed to cocaine exposure.46-48 Addiction research has found that treatment and education strategies are effective and less costly than punitive ones.49-51

In summary, neither US state laws nor the courts support criminal prosecution of pregnant women for prenatal actions, except in South Carolina. Even in South Carolina, pregnant women may not be subjected to nonconsensual drug testing for the purpose of criminal prosecution. There is a possibility that legislatures will consider new proposals to criminalize pregnant women’s behavior or health conditions; however, to date they have declined to adopt such a strategy, which is in keeping with evidence-based medical recommendations that support treatment approaches to drug use or addiction, not punitive ones. Physicians do need to be aware of state civil mandates regarding pregnant women, guidelines for addiction treatment, and confidentiality laws regarding patients with substance abuse problems.52,53 However no state authorizes or expects physicians to use medical evidence of addiction for criminal prosecution. As the Supreme Court recently indicated, physicians caring for pregnant women are not required to act as agents of the criminal justice system; they should serve medical, not legal, roles in the care of pregnant women.
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